IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 131, 132

MARGARET L. HOLT, *et al.*,

Petitioners,

—against—

ALLEGHANY CORPORATION, *et al.*

MARGARET L. HOLT, *et al.*,

Petitioners,

—against—

ALLAN P. KIRBY, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

Margaret L. Holt and Kathleen L. McMahon petition for a rehearing of the decision of this Honorable Court which dismissed on April 18, 1966 the writs of certiorari to the Court of Appeals for the Second Circuit as having been improvidently granted.

The record, opinions below, petitions and briefs are before the Court and together aggregate a tortuous account of protracted litigation arising from a simple indefensible breach of trust by Kirby, Young and Purcell.

This petition will be confined to the bare outlines of the reasons why this Honorable Court cannot in conscience and in discharge of its duties permit this litigation to end with its ambiguous determination of April 18th last. The points made in intervenors' petitions and briefs in both cases are incorporated by reference.

If no further action is taken by this Honorable Court:

(1) There will be an implied sanction for a corporate fiduciary to cease to act as such immediately he is sued for breach of his duty in relation to a self-dealing transaction.

(2) There will be created a presumption that directors of a corporation are independent and unbiased even when the record shows unequivocally that they are the appointees —minions—of a controlling-stockholder defendant in derivative actions. Intervention under Rule 24 (a) in such cases will be a dead letter.

(3) By hamstringing independent shareholders and their counsel in their attempts to illuminate and challenge collusive settlements of derivative actions, a major pragmatic sanction that restrains dominant corporate officers from illicit self-dealing will be removed.

(4) By the same token, the salutary effects of *Surowitz* v. *Hilton,* 34 U. S. L. Week 4196 (U. S. March 7, 1966), 15 L. ed. 2d 807, will become illusory if well-heeled directors are allowed, as here, to wear down derivative plaintiffs and to obtain an unjust settlement by concealment.

(5) In this case the judicial process itself seems to have failed. Despite three full sets of appellate briefs on the merits the best the system can produce is agreement by

the eight qualified judges of the Second Circuit to disagree. In the past this Court has viewed an even division below as a block in the wheels of justice (*New England Mar. Ins. Co.* v. *Dunham,* 78 U. S. 1, 21-22 (1871)). We see no distinction in principle here.

The protracted and involved series of lawsuits here mushroom from a single simple act of wrongdoing. Sixteen years have elapsed since a small group of clever, unprincipled men abused their position of trust by appropriating to themselves entrusted property which their inside information told them would vastly increase in value. All that is sought is restitution—$61 million worth of stock for which initially was paid $400,000, to which was added some portion of $2,500,000 paid in settlement of a claim based on that transaction as well as other claims.

The course of this legal battle could well raise justified doubts in the public mind whether the legal process is capable of either making law or doing justice in defining clear guidelines of fiduciary conduct requisite for the functioning of an intricate financial economy. Dickens' opprobrium of the legal process in Bleak House could be apposite. The issues here cry for resolution, yet they have remained unresolved by the narrowest of margins. Kirby will keep his gains by sharply-divided appellate votes of 2-1, a 4-4 split (after a 4-3 vote in favor of rehearing), and now by a 4-3 no decision by this Court after at least four justices presumably voted for certiorari and three publicly dissent to urge that a decision be made.*

* Indeed, on the merits of this case petitioners, counting Mr. Justice Black's vote, have had a majority of the appellate votes in their favor.

Nothing is more important to the effective and ethical conduct of the huge private sector of the American economy than that the standards of fiduciary responsibility developed over the past several decades by common law and statute be rigorously sustained. The Securities Exchange Act of 1934 and the many decisions enforcing its strictures on corporate fiduciaries will be seriously eroded if the judiciary appears incapable of punishing such an abuse as is here involved.

Congress has recognized an emerging national necessity to apply national considerations to fiduciary relationships in the highly complicated formations of capital nceessary for the functioning of an increasingly national economy. The hierarchy of federal corporations created by the Congress over the last few years now includes mixed government and private investment corporations like Comsat in which individual public stockholders are joint investors both with a federal corporation and other corporations regulated by federal agencies like the Federal Communications Commission.

In the Investment Company Act of 1940, 15 U. S. C. §80(a)-24(d), Congress significantly withdrew for investment companies (such as those controlled by Alleghany) an original exemption from the registration provisions of the Securities Act for investment companies functioning substantially intra-state. The Welfare and Pension Fund Act of 1959, 29 U. S. C. §§301-309, empowers the Labor Department to set up federal standards for disclosure to beneficiaries by those controlling such funds, and it is significant that there has been proposed in Congress that, because of the predominantly legal aspects of this fiduciary

problem, the jurisdiction of this Welfare and Pension Fund legislation be transferred from the Labor Department to the Justice Department.

All this clearly indicates the considered policy of the federal government to recognize the national interest in the relationship of stockholders (especially in enterprises of national scope) to those who manage other people's money. It would contradict such clear manifestation of national policy for this highest national Court to wash its hands of a case which raises national issues at the core of that relationship and leave these fiduciary matters, as in an earlier period of the financial development of the country, to the variations of state law.

Even beyond the requirements of Federal Statute law stands the gradual ennoblement of ancient equity's demands on all who take unto themselves responsibility for the property of others as so well put by Justice Cardozo nearly forty years ago:

> "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard* v. *Salmon,* 249 N. Y. 458, 464, 164 NE 545, 547 (1928).

Should this Honorable Court refuse to review a split decision which has befogged Justice Cardozo's beacon beam of probity, or, is it not time for it to grapple with the relatively simple essentials of this case and reannunciate the standards to which those who would principally guide our corporate economy must adhere?

The determination to grant the writs here in question was made when all of the members of this Court were present. We understand it to be the established practice of the Court to grant certiorari when four justices so vote, *United States* v. *Shannon,* 342 U. S. 288, 298 (1952) (Mr. Justice Douglas' dissent). We further understand that on occasion five justices have nonetheless voted to dismiss a writ as improvidently granted. Here only four justices have exercised that discretion. Yet the result, coming after the 4-4 split below, precludes an appellate determination of the issues in this case.

We believe that both sound practice and simple fairness to the parties require that such a procedural determination should have been made by the full court.

Although Mr. Justice Douglas did not participate in this Court's determination of April 18, 1966, he voted on the granting of the petition for a writ and it appears that he would not be prevented from participating in the decision on the instant petition, especially since the April 18 determination was not on the merits. His participation would, of course, mean that the Court would consist of only eight Justices with the possible result that another 4-4 determination could be made on the instant petition and subsequently on the merits. For this reason and because of the compelling need to resolve, once and for all, the ambiguities that exist as a result of the prior determination in this case we respectfully submit that this matter be considered by the full bench of this Honorable Court and pray

that Mr. Justice Fortas reconsider his decision not to participate in this case.

Petitioners are prepared to supply a transcript of the oral argument upon request.

Respectfully submitted,

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May 11, 1966

Certificate of Counsel

The undersigned, Stuart N. Updike, being attorney for Petitioners, hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay.

STUART N. UPDIKE

SUPREME COURT OF THE UNITED STATES

Nos. 131 and 132.—October Term, 1965.

Margaret L. Holt et al., Petitioners, 131 *v.* Alleghany Corporation et al.	On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.
Margaret L. Holt et al., Petitioners, 132 *v.* Allan P. Kirby et al.	

[April 18, 1966.]

Per Curiam.

The writs of certiorari are dismissed as improvidently granted.

Mr. Justice Black dissents from dismissal of the writs and would reverse the judgment of the Court of Appeals and district courts substantially for the reasons stated in Judge Friendly's dissent in the Court of Appeals.

Mr. Justice Harlan and Mr. Justice White dissent from the dismissal of the writs, believing that these cases having been taken for review should be adjudicated on the merits.

Mr. Justice Douglas and Mr. Justice Fortas took no part in the consideration or decision of these cases.